UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEVADA YELLOW CAB CORPORATION,
NEVADA CHECKER CAB CORPORATION,
and NEVADA STAR CAB CORPORATION,
a Single Employer

and **Case 28-CA-218477**

INDUSTRIAL TECHNICAL &
PROFESSIONAL EMPLOYEES UNION,
OPEIU LOCAL 4873, AFL-CIO

Kyler A. Scheid, Esq., for the General Counsel.
Jonathan M. Turner and Danton W. Liang, Esqs., (Mitchell Silberberg & Krupp, LLP, Los Angeles, California,) for the Respondent.
Sidney H. Kalban, Esq.,(Industrial Technical & Professional Employees Union, New York, New York) for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Las Vegas, Nevada on October 23-25, 2018. Industrial, Technical & Professional Employees Union, OPEIU Local 4873 filed the charge giving rise to this case on April 12, 2018. The General Counsel issued the complaint on July 24, 2018.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the method of computing the compensation of Respondent's taxi drivers in a manner different than that set forth in the collective bargaining agreement that had just become effective in January 2018. He also alleges a violation Section 8(a)(5) in Respondent's refusal to pay part of a ratification bonus to which Respondent and the Union agreed in December 2018. Finally, he alleges Respondent violated the Act in refusing to take the Union's grievance about the change in the compensation calculation to Step 3 of the grievance procedure set forth in the parties' new contract.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation and admitted single employer, operates taxi cabs in Las Vegas, Nevada. It annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Nevada. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, ITPEU Local 4873 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates taxi cab companies in Las Vegas, Nevada. It compensates its drivers on a commission basis. The Union, ITPEU Local 4873, has represented Respondent's drivers since at least the 1980s. Respondent and the Union have had many collective bargaining agreements (CBA). Material to this case is the agreement that ran from May 2, 2013 until July 31, 2017, G.C. Exh. 2, and a successor agreement which is effective from January 10, 2018 until January 9, 2022. Prior to the signing of the 2013 contract, the Union engaged in a 60-day strike against Respondent.

Negotiations for the 2018-2022 contract began on June 7, 2017. There were 10 bargaining session, the last being held on December 6, 2017. Respondent's lead negotiator was Jonathan Schwartz, a member of the company's board of directors. Jere McBride, company paralegal/chief technology officer, took comprehensive notes at the bargaining sessions for Respondent.[1] Michael Bailin, Respondent's Director Taxicab Operations also participated in the negotiations.

The lead negotiator for the Union was Paul Bohelski, a senior international representative. The Union was also principally represented by Dennis Arrington, the Local Union President, Theatla "Ruthie" Jones, a union representative and Sam Moffit, another union representative and former taxi driver.[2] Looming in the background of these negotiations was the fact that taxi cab companies, including Respondent, have been losing revenue due to the increased use of app-based services such as Uber and Lyft.

The major issue in this case concerns the "trip charge." This is a fee associated with every trip a driver makes. Each shift, Respondent's drivers average 14 trips. Annually, Respondent's drivers make millions of trips, so how payment of the trip charge is allocated

[1] The Union did not take comprehensive notes.

[2] Moffit did not testify in this proceeding. The others mentioned above were witnesses.

between Respondent and the drivers significantly determines the amount of the drivers' compensation and Respondent's net revenue.

The amount of the trip charge under all relevant collective bargaining agreements has been 60 cents per trip. In addition there has been a 5 cent technology fee which is ultimately paid to governmental taxi authorities for each trip. Under all the contracts prior to the one effective in January 2018, 65 cents was deducted from the passenger's fee on the meter (aka "the book"). Then a percentage set forth in the CBA was applied to the remaining amount, which represented the driver's compensation for that trip. Thus, if the fare was $10, 65 cents was deducted, and the driver's share was computed from that figure. For example an employee with 10 years or more of service would get $4.11 ($10-.65=9.35. 44% of $9.35=4.11.4).

The relevant provision of the 2013-2017 collective bargaining agreement reads as follow, G.C. Exh. – 2, p. 25:

> Article Eighteen-Wages
>
> Section A
>
> For purposes of this section "net book" shall be defined as the total book reduced by sixty cents (.60) per trip plus all additional Taxicab Authority fees or any other fee imposed by a duly empowered governmental agency.
>
> Section B states that each driver shall share in the meter and be paid in the following percentage of his/her "net book" according to their length of service.
>
> These percentages range from 38.5% to 44 %.

Starting on January 11, 2018, Respondent began calculating the driver's compensation differently. For a $10 fare, for example, the driver's percentage set forth in the new cba was applied to the $10 fare and the 65 cents was deducted from that figure afterwards. Thus, an employee with 10 or more years of service would get $3.75 for a $10 cab ride; not $4.11 ($10 x .44=$.4.40-.65=$3.75). Over the course of time, this results is a significant decrease in drivers' compensation.[3]

The relevant provision of the 2018-2022 contract reads as follows (with the changes from the prior contract in bold):

> For purposes of this section, "net book" shall be defined as the total book reduced by **Section B of Article 18 hereof,** reduced by 60 cents per trip plus all additional Taxicab Authority fees or any other fees imposed by a duly empowered governmental agency. **Notwithstanding the foregoing any additional fees imposed by the TA or any duly empowered governmental entity shall not be shared by the driver.**

[3] The difference between the old method and the new method is $7,000,000 over a 4-year period according to Paul Bohelski.

Section B states that each driver shall share in the meter and be paid in the following percentage of his/her "net book" according to their length of service.

These percentages range from 39% to 44 %.

The parties generally deferred economic issues until the latter negotiating sessions. On August 22, the Union proposed increasing the trip charge (or trip charge + taxi authority fee) from 65 cents to 85 cents. Respondent rejected that proposal. Jonathan Schwartz stated that the company did not want to raise the trip charge because it was one of the lowest in the industry and thus aided Respondent in recruitment.

At the September 26 bargaining session, Respondent proposed a 25 cent increase its contribution to employees' health insurance premiums. Later, it increased its proposal to a 30 cent increase. In exchange, the company proposed that the Union waive the minimum wage, which the parties are allowed to do under Nevada law. Generally, how to pay for the increase in health insurance premiums was a major issue during negotiations. The Union declined to waive the minimum wage.

On September 27, the Union made a proposal regarding the percentages of the "net book" that would be paid to the drivers. There was no discussion of the trip charge.

The November 9, 2017 bargaining session

At the heart of this case is what transpired at the 9th bargaining session which was held on November 9, 2017 with regard to how drivers' compensation would be calculated. Besides Bohelski, Dennis Arrington, President of the ITPEU and Theatla "Ruthie" Jones, a union representative, witnesses in this proceeding, were present. Several others were present for the Union but only driver Sam Moffit's presence has any significance to this matter.

Jonathan Schwartz testified that the trip charge was discussed for the first time at this meeting and that he explained that Respondent now proposed to apply the driver's percentage to the book (or meter meeting) before subtracting the 65 cents for the trip charge and technology fee. The Union witnesses dispute this. Respondent's bargaining notes from November 9, G.C. 15, are not dispositive regarding this issue.

These notes reflect that in mid-morning there was a discussion of Article 18 of the collective bargaining agreement, which deals with wages. According to the notes, Schwartz told the Union that they were calculating the numbers wrong. Bohelski then told Schwartz to show him where.

The notes reflect the following:

Schwartz: we take gross take out [of?] trip charge, then calculate…others calculate gross then percentage then take out trip charge…

Bohelski—we called companies to see if it's accurate…Rias and Bell…our comparison we used Henderson Frias Whittlesea and Nellis[4]

Schwartz: but when you did ours…we are paying…the driver is only paying 40% of the trip charge…we are paying 60%

G.C. 15, pp. 220.

There was further discussion at 2:45 p.m., G.C. 15, pp. 224.

Bohelski: Section, what you're proposing and changing what's in the book…want to be clear about extra nickel…they take off 65 cents at the end of the shift…

Schwartz: going to walk you through this…it looks like it's not a big deal but calculated over millions of trips, it's a big deal…only the technology fee.

Id. At p. 224.

Schwartz testified that at about this time he walked around the bargaining table between Bohelski and Sam Moffit and showed them a calculation on a sheet of yellow legal pad, Exh. R-3, which compared what Respondent was proposing with how the trip charge deduction was handled under the 2013-17 contract. This calculation is predicated on 14 trips totaling $200 in fares. It shows that the driver's compensation would be $5.16 less by applying the driver's percentage prior to deducting the trip charge.

Respondent's witnesses, Bohelski, Arrington and Jones testified that the new method of calculating compensation was not explained them. Bohelski testified that he did not *recall* seeing the yellow sheet, Exh. R-3.[5] Union witnesses testified that the parties discussed the technology fee at length, but not a change in how the trip charge would be deducted. I credit Schwartz's testimony that he showed the calculation in Exh. R-3 to Moffit and Bohelski. [6]

On the afternoon of November 9, Respondent sent the Union a revised contract proposal. The cover letter does not mention the change to the method of calculating the trip charge. However, the proposal itself regarding the trip charge is identical to that in the final CBA, in effect the drivers end up paying the entire trip charge, not just a percentage as in the prior CBA, G.C.Exh.17.

[4] These are competing taxi companies.

[5] Dennis Arrington also testified that he did not *recall* Respondent proposing to take the trip charge entirely out of the driver's share of the meter, as opposed to categorically testifying that this never happened, Tr. 337-38. At Tr. 351, Arrington conceded that Schwartz told the Union that Respondent had been paying the wrong amount for the trip charge.

[6] Bohelski recalled Schwartz writing something on piece of paper and sliding it across the table to Sam Moffit. He stated this referred only to the technology fee, Tr. 275-76. At Tr. 307, Bohelski said Schwartz leaned over and showed a piece of paper to Moffit. At Tr. 323-24, Bohelski was given the opportunity to question Schwartz's veracity and declined to do so.

The next and last bargaining session occurred on December 6, 2017. There was no discussion about how wages would be calculated at this meeting. Respondent presented the Union with its last best and final offer.

On December 13, Jonathan Schwartz had a telephone call with Bohelski and Arrington. The two union officials indicated that they would have a hard time getting the unit members to ratify Respondent's last, best and final offer. Schwartz testified that Bohelski told him that the reasons Respondent's offer was a "tough sell" were the waiver of the minimum wage, the method of deducting the technology fee and the method of deducting the trip charge. The Union witnesses deny mentioning the trip charge.

Bohelski and Arrington suggested that a $1,000 ratification bonus would markedly improve the chances for ratification. After a second call, the parties agreed that if unit members ratified Respondent's last, best and final offer, drivers with 5 years or more of seniority would receive $500 upon execution of the contract. Drivers with less than 5 years-service would receive $250 upon execution and another $250 if they remained employees for 90 days after the contract was signed.

On December 22, Respondent sent the Union a "redline" version of the new contract. Article 18, Section A appeared as follows in this document.

> For purposes of this section, "net book" shall be defined as the total book reduced by Section B of Article 18 hereof reduced by 60 cents per trip plus all additional Taxicab Authority fees or any other fee imposed by a duly empowered governmental agency. Notwithstanding the foregoing any additional fees imposed by the TA or any duly empowered governmental entity shall not be shared by the driver. ~~For purposes of this section "net book" shall be defined as the total book reduced by sixty cents(.60) per trip plus all additional Taxicab Authority fees or any other fee imposed by a duly empowered governmental agency.~~

G.C. Exh. 30, p. 27.

Unit employees ratified the contract on January 6, 2018. Respondent executed the contract on January 10 and immediately implemented its new method of deducting the trip charge.

The Union's grievance

On January 29, 2018, the Union filed a grievance, asserting that Respondent was incorrectly and improperly calculating driver's wages. On February 14, Respondent denied the grievance. A step 2 grievance meeting was held on March 21. At the end of that meeting, "Ruthie" Jones, on behalf of the Union, advised Respondent that the Union was taking the grievance to step 3, Tr. 511. The Union sought to take its grievance to step 3 *by filing a written*

appeal on April 9. Respondent rejected this request on April 10, asserting that the request was untimely under Article 15 of the contract. That provision specifies that an appeal to step 3 must be made in writing within 10 days of the step 2 meeting (thus no later than April 1 or 2). The Union contends that Respondent has a practice of responding in writing to a step 2 meeting, that it did not do so in this matter and therefore its appeal to step 3 was not untimely.

Respondent withholds half of the bonus to drivers with less than 5 years of service

On April 11, Respondent informed the Union that in light of the dispute over the wage provision of the new contract, it would be place the $250 due to drivers with less than 5 years' service in an interest-bearing reserve account. These drivers had already been paid the first $250 installment and the more senior drivers had received their entire $500 bonus. Respondent informed the Union that these funds would remain in the reserve account until the parties' dispute over the wage provisions of the new contract was resolved.

Analysis

Respondent did not violate the Act in computing driver's compensation in accordance with its interpretation of Article 18, Section A of the 2018-2022 collective bargaining agreement.

In a "contract modification" case the issue is whether the employer had a sound basis for its actions. If so, the General Counsel fails to prove the it modified the contract within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act, *Bath Iron Works Corp.,* 345 NLRB 499, 502 (2005).

In the instant case Respondent had a sound basis for interpreting Article 18, Section A to mean that the driver's percentage take (between 39% and 44% of the meter reading as set forth in Section B) would be applied to the meter reading before deducting the trip charge. First of all, the plain language of Section A suggests as much. Moreover, the drafts of the contract and the December 30 redline version of the contract make it abundantly clear that there is a change in Article 18, Section A of the 2018-2022 collective bargaining agreement from the prior agreement.

There would be no reason for the change in the language unless the method of computing drivers' wages was changing. This would be obvious to any reasonable person. Thus, Respondent did not violate Section 8(a)(5) and (1).

Respondent did not violate the Act in refusing to pay relatively new taxi drivers half of the ratification bonus

The parties agreed that Respondent would pay drivers a ratification bonus in exchange for their acceptance of its last, best and final offer in contract negotiations. The drivers ratified the contract and Respondent paid the bonuses until learning that the Union challenged its interpretation of Article 18, Section A. Since the Union backed away from the agreed upon conditions for the bonus, Respondent was not obligated to pay the rest of the bonus—at least until there is a determination that the Union's interpretation of the new contract is correct, *see Hertz Corp.,* 304 NLRB 469 (1991).

Respondent did not violate the Act in refusing to take the Union's grievance over employee compensation to Step 3 of the grievance procedure

The Union's request to take its grievance to Step 3 was clearly untimely under the terms of the collective bargaining agreement. Article 15 of the new contract requires that a grievance must be appealed *in writing* to step 3 within 10 days of the step 2 meeting. The step 2 meeting took place on March 21; the Union appealed the denial of the grievance on April 9, over a week late.

However, the record shows that with regard to discharge grievances, Respondent always, or almost always denied step 2 grievances in writing. It did not do so with regard to the grievance over the interpretation of Article 18, Section A. Respondent has not established that it had a different practice with regard to grievances that do not involve terminations. Moreover, Respondent did not produce all the grievance forms requested in the General Counsel's subpoena. I find that the record shows that Respondent generally had a practice of denying grievances in writing.

On the other hand, the General Counsel has not shown that Respondent had a practice of ignoring the time requirements set forth in Article 15, the grievance procedure of the new and prior contracts. One could argue that since the Union advised Respondent at the step 2 meeting that it was taking its grievance to step 3, it would be a matter of putting form over substance to allow Respondent to refuse to advance the grievance to step 3.

The equities in this case, however, favor Respondent. Thus, I find that since the request to take the grievance to step 3 was untimely. Respondent was privileged to refuse to advance it to step 3. I do so in part because the Union's grievance was not filed in good faith. It was obvious ever since November 9 that Respondent was proposing a significant change in the way driver's compensation was calculated. Assuming that the union representatives did not appreciate the significance of this change when Jonathan Schwartz explained it to them, they could not possibly have missed the significance of the changes when they received the red-line version of the contract on December 22. When the contract was ratified, the Union representatives had to have known how the trip charge was going to be deducted when the new collective bargaining agreement went into effect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 27, 2018

Arthur J. Amchan
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.